

# United States Senate

WASHINGTON, DC 20510

January 11, 2017

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army  
Department of the Army, Civil Works  
108 Army Pentagon  
Washington, DC 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

We write to seek assurances regarding the scope and implications of the EPA's Clean Water Rule. As you know, the rule, finalized and published in the Federal Register on June 29, 2015, was stayed by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015. Acknowledging that the rule is currently undergoing review in the courts and cannot legally be enforced by EPA, we continue to hear concerns from constituents and read claims from industry that suggest the Rule's reach is more expansive than EPA has indicated. Consequently, we are requesting responses to several claims, outlined below, so our offices can provide additional clarity to our constituents regarding the reach of the Clean Water Rule should it go into effect in the future. The specific questions we are seeking clarity on are as follows:

- 1) Are the EPA and the Corps currently implementing the new Clean Water Rule?
- 2) Are the EPA and the Corps currently pursuing enforcement actions pursuant to the new Clean Water Rule?
- 3) Does anything in the Clean Water Rule revoke or otherwise modify the Clean Water Act's statutory and regulatory exemptions for farming and ranching?
- 4) Some have claimed that landowners will no longer be able to rely on the Clean Water Act's statutory and regulatory exemptions for farming and ranching should the Clean Water Rule go into effect because, while the statute and regulations remain unchanged, the agency has narrowed those exemptions "in practice" through their actions in the field. Is that true?
- 5) Several case studies related to farming practices – including examples related to plowing, discing, construction of stock ponds, and new uses of cropland – have been presented to Members of Congress to suggest that the Clean Water Rule is expanding the agencies' jurisdiction under the Clean Water Act. If you are familiar with the aforementioned case studies, are any of them examples of new enforcement actions under the Clean Water Rule?

- 6) Are some or all of the case studies highlighted actually federal enforcement actions conducted in accordance with prior agency regulations promulgated before the Clean Water Rule?
- 7) Considering all of the agencies' jurisdictional determinations since the *SWANCC* (2001) and *Rapanos* (2006) cases, is it fair to characterize the Clean Water Act's geographic scope as narrower than it was prior to those decisions?
- 8) Are prior converted croplands still excluded from Clean Water Act jurisdiction?
- 9) Are permafrost soils considered waters under the jurisdiction of the Clean Water Act?

Thank you for your consideration of these questions. We look forward to your prompt response.

Sincerely,

Debbie Stenderow

Tom Carper

Jon Tester

Mazie Hirono

Mark Warner

Brian Schatz

Bob Casey, Jr.

Chris Coons

Mitt F. Bennett

Patrick Leahy

Robert Menendez

Sheldon Whitehouse